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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Emily Cota,

10 Plaintiff,

11 v.

12 Paul Penzone, et al.,

13 Defendants.  
14

No. CV-18-02535-PHX-RM

**ORDER**

15 Pending before the Court is Defendants' Motion to Dismiss. (Doc. 18.) Plaintiff  
16 Emily Cota filed a combined Response and Motion to Amend Complaint, to which  
17 Defendants have responded. (Docs. 21, 22.) The motions are suitable for determination  
18 without oral argument.

19 **I. Background**

20 The Complaint contains the following allegations: on August 30, 2016, Plaintiff  
21 Emily Cota took the day off work to get together with family and mourn the death of her  
22 uncle, who had passed on August 29. (Doc. 1, ¶¶ 12–13.) Plaintiff spent the night at her  
23 grandmother's house in West Mesa and was there at approximately 10:50 p.m. (*Id.*)

24 On the same day and time, at the intersection of Power Road and Apache Trail,  
25 Deputy A. Bratt observed a Ford Mustang with a Texas license plate registered to a Ford  
26 truck. (*Id.* ¶ 14.) There were four people in the vehicle: a female driver, a male front-seat  
27 passenger, and two female backseat passengers. (*Id.* ¶ 15.) Deputy Bratt followed the  
28 Mustang to a nearby Circle K and asked for the license and registration from the female

1 driver. (*Id.*) Deputy Fortner ran a warrant check on the driver and male passenger, while  
2 Deputy Bratt spoke to the backseat passengers. (*Id.*)

3 Deputy Bratt had both backseat passengers exit the Mustang and asked if either had  
4 marijuana on them. (*Id.* ¶ 16.) Both initially said no. (*Id.*) Subsequently, one of the  
5 backseat passengers, who later claimed to be Emily Cota, admitted to having a marijuana  
6 pipe in her purse. (*Id.*) The female claiming to be Emily Cota showed Deputy Bratt the  
7 marijuana pipe, and Deputy Bratt detained her in the back of his patrol car. (*Id.* ¶ 17.)  
8 Neither backseat passenger had identification, so Deputy Fortner and Deputy Bratt ran the  
9 names provided by the females and compared their physical appearances to images  
10 recorded with the Arizona Motor Vehicle Division (“MVD”). (*Id.*) Based on the  
11 comparison, the deputies determined that both females had provided false information. (*Id.*  
12 ¶ 18.)

13 Deputy Bratt asked the female claiming to be Emily Cota to provide a home address.  
14 (*Id.* ¶ 20.) The address provided did not match the information in the MVD profile. (*Id.*)  
15 Deputy Bratt asked for an address a second time. (*Id.* ¶ 21.) The female claiming to be  
16 Emily Cota then stated she lived with the other occupants of the vehicle at 580 W.  
17 Galveston Road, Chandler, Arizona. (*Id.*) The other occupants of the vehicle provided  
18 their addresses, none of which were the Galveston Road address. (*Id.* ¶ 22.)

19 None of the four individuals were booked or fingerprinted to verify their identities.  
20 (*Id.* ¶ 23.) Deputy Bratt and Deputy Fortner submitted charges against Plaintiff based upon  
21 the information provided by the female claiming to be Emily Cota. (*Id.* ¶ 24.) The case  
22 was submitted to the Maricopa County Attorney’s Office and, on February 8, 2017, a  
23 summons was issued. (*Id.* ¶ 26.) On February 21, 2017, the summons was returned as  
24 non-deliverable. (*Id.* ¶ 27.) On March 10, 2017, an arrest warrant for Plaintiff was issued.  
25 (*Id.* ¶ 28.)

26 Sometime in November 2017, Plaintiff learned there was an outstanding warrant for  
27 her arrest. (*Id.* ¶ 29.) On December 21, 2017, Plaintiff’s counsel filed a notice of  
28 appearance and moved to quash the warrant. (*Id.* ¶ 30.) On January 8, 2018, Plaintiff

1 appeared for her initial appearance and was released on her own recognizance. (*Id.* ¶ 31.)  
2 On February 7, 2018, following the presentation of evidence, a Maricopa County court  
3 dismissed the case against Plaintiff without prejudice. (*Id.* ¶ 32.)

4 Plaintiff names as Defendants Deputy Bratt, Deputy Fortner, Maricopa County  
5 Sheriff Paul Penzone, and the Maricopa County Sheriff's Office. She alleges seven claims,  
6 each claim against all Defendants. She alleges three claims under 42 U.S.C. § 1983: one  
7 for abuse of process, malicious prosecution, and failure to train (Count I), one for violation  
8 of substantive due process (Count II), and one for violation of equal protection (Count III).  
9 She also alleges state-law claims for abuse of process and malicious prosecution (Count  
10 IV), intentional infliction of emotional distress (Count V), gross negligence and negligent  
11 supervision (Count VI), and false arrest and imprisonment (Count VIII).<sup>1</sup>

## 12 **II. Standard of Review**

13 Defendants move for dismissal under Rule 12(b)(6) of the Federal Rules of Civil  
14 Procedure for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P.  
15 12(b)(6). Dismissal under Rule 12(b)(6) "can be based on the lack of a cognizable legal  
16 theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri*  
17 *v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988), *as amended*. To survive a  
18 Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter,  
19 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*,  
20 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).  
21 In other words, the complaint's "non-conclusory factual content, and reasonable inferences  
22 from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."  
23 *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks  
24 omitted). "A claim has facial plausibility when the plaintiff pleads factual content that  
25 allows the court to draw the reasonable inference that the defendant is liable for the  
26 misconduct alleged." *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a  
27 cause of action, supported by mere conclusory statements, do not suffice." *Id.*

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28 <sup>1</sup> The Complaint skips Roman numeral "VII."

1 A court evaluating a motion to dismiss must view the allegations of a complaint “in  
2 the light most favorable to the plaintiff.” *Abramson v. Brownstein*, 897 F.2d 389, 391 (9th  
3 Cir. 1990). All well-pleaded factual allegations of the complaint must be accepted as true,  
4 although the same does not apply to legal conclusions couched as factual allegations.  
5 *Iqbal*, 556 U.S. at 678–79.

### 6 **III. Discussion**

#### 7 **A. Maricopa County Sheriff’s Office**

8 The Maricopa County Sheriff’s Office will be dismissed because it is a nonjural  
9 entity that is incapable of being sued. *Braillard v. Maricopa County*, 232 P.3d 1263, 1269  
10 (Ariz. Ct. App. 2010).

#### 11 **B. Sheriff Penzone**

12 Plaintiff has failed to state a § 1983 claim against Sheriff Penzone. “A supervisory  
13 official is liable under § 1983 so long as ‘there exists either (1) his or her personal  
14 involvement in the constitutional deprivation, or (2) a sufficient causal connection between  
15 the supervisor’s wrongful conduct and the constitutional violation.’” *Rodriguez v. County*  
16 *of Los Angeles*, 891 F.3d 776, 798 (9th Cir. 2018) (quoting *Keates v. Koile*, 883 F.3d 1228,  
17 1242–43 (9th Cir. 2018)). There is no *respondeat superior* liability for § 1983 claims.  
18 *Felarca v. Birgeneau*, 891 F.3d 809, 820 (9th Cir. 2018) (citing *Jones v. Williams*, 297  
19 F.3d 930, 934 (9th Cir. 2002)).

20 Plaintiff makes no attempt to defend her § 1983 claims against Sheriff Penzone.  
21 Furthermore, Plaintiff fails to allege that Sheriff Penzone did any act at all, much less an  
22 act that violated her constitutional rights. At most, Plaintiff alleges that Deputy Bratt and  
23 Deputy Fortner conducted an inadequate investigation. By itself, that fact does not support  
24 an inference that Sheriff Penzone failed to adequately train or supervise the deputies, or  
25 that the deputies were acting pursuant to an unconstitutional policy or practice enacted by  
26 Sheriff Penzone. See *City of Canton v. Harris*, 489 U.S. 378, 390–91 (1989) (“That a  
27 particular officer may be unsatisfactorily trained will not alone suffice to fasten liability  
28 [on the supervisor], for the officer’s shortcomings may have resulted from factors other

1 than a faulty training program.”). Plaintiff’s § 1983 claims against Sheriff Penzone for  
2 failure to train, abuse of process, and malicious prosecution (Count I), violation of  
3 substantive due process (Count II), and violation of equal protection (Count III)  
4 impermissibly rest on a *respondeat superior* theory. These claims will be dismissed, as  
5 will Plaintiff’s state-law claim for negligent supervision (Count VI).<sup>2</sup>

### 6 C. Abuse of Process & Malicious Prosecution<sup>3</sup>

7 Plaintiff has failed to state a § 1983 claim for abuse of process. The elements of  
8 abuse of process under Arizona law are “(1) a willful act in the use of judicial process; (2)  
9 for an ulterior purpose not proper in the regular conduct of the proceedings.”<sup>4</sup> *Fappani v.*  
10 *Bratton*, 407 P.3d 78, 81 (Ariz. Ct. App. 2017) (quoting *Nienstedt v. Wetzel*, 651 P.2d 876,  
11 881 (Ariz. Ct. App. 1982)). An improper purpose can be shown by demonstrating “that  
12 the process has been used primarily to accomplish a purpose for which the process was not  
13 designed.” *Nienstedt*, 651 P.2d at 881. Here, Plaintiff does not allege facts showing that  
14 the deputies submitted charges for an improper purpose. That the deputies did not  
15 investigate further after failing to identify the female does not by itself suggest they acted  
16 with an improper purpose.

17 Plaintiff contends that she has stated a claim because she has evidence that, prior to  
18 issuing a citation, the deputies found identification in the vehicle showing that the female  
19 claiming to be Emily Cota was in fact Tania Hernandez. This allegation was not included

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20 <sup>2</sup> Negligent supervision is a form of direct liability. *See Humana Hosp. Desert*  
21 *Valley v. Maricopa Cty. Superior Court*, 742 P.2d 1382, 1386 (Ariz. Ct. App. 1987).  
22 Therefore, the lack of factual allegations against Sheriff Penzone is fatal to that claim.  
23 Plaintiff’s other state-law claims will remain pending against Sheriff Penzone, however,  
because Arizona law (unlike federal law) provides that a supervisor may be vicariously  
liable for an employee’s wrongful conduct. *See Wiggs v. City of Phoenix*, 10 P.3d 625,  
627–28 (Ariz. 2000).

24 <sup>3</sup> Plaintiff purports to bring “malicious and selective prosecution” claims.  
25 However, Plaintiff’s allegations in no way implicate a theory of selective prosecution. *See*  
26 *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1071 (9th Cir. 2004) (explaining that a  
selective-prosecution claim requires proof that the plaintiff was prosecuted under a facially  
neutral law in a discriminatory manner). The Court therefore construes the Complaint as  
alleging only malicious prosecution.

27 <sup>4</sup> In order for an abuse-of-process theory to support a § 1983 claim, the plaintiff  
28 must also allege that the defendant’s conduct was done for the purpose of denying the  
plaintiff a “specific constitutional right.” *See Albright v. Oliver*, 510 U.S. 266, 271 (1994)  
(plurality opinion); *Sexton v. Chino Valley Indep. Fire Dist.*, 7 Fed. App’x 660, 662 (9th  
Cir. 2001).

1 in the Complaint, however, and thus may not be considered.<sup>5</sup> *Lee v. City of Los Angeles*,  
2 250 F.3d 668, 688 (9th Cir. 2001) (stating general rule that “a district court may not  
3 consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion” (quoting  
4 *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994))). Next, Plaintiff contends that because  
5 law enforcement has various tools to verify people’s identities (e.g., fingerprinting), the  
6 submission of charges without first utilizing those tools “obviously would be an abuse of  
7 process.” This argument rests on a flawed assumption: that an officer who inadequately  
8 investigates a crime is necessarily acting with an ulterior, improper purpose. Whether or  
9 not the deputies could have completed a more thorough investigation, the submission of  
10 charges against an individual who illegally possessed paraphernalia, without more, is not  
11 a use of the judicial process “so lacking in justification as to lose its legitimate function as  
12 a reasonably justifiable litigation procedure.” *Nienstedt*, 651 P.2d at 882.

13 Plaintiff has also failed to state a § 1983 claim for malicious prosecution. This claim  
14 requires a criminal prosecution “actuated by malice.”<sup>6</sup> *Slade v. City of Phoenix*, 541 P.2d  
15 550, 552 (Ariz. 1975) (citing *Overson v. Lynch*, 317 P.2d 948, 949 (Ariz. 1957)). Malice  
16 exists when the defendant “further[s] some charge of crime from base and improper  
17 motives; that is, from some motive other than a desire to have the laws enforced, crime  
18 suppressed, and the guilty brought to justice.” *Leeker v. Ybanez*, 211 P. 864, 865 (Ariz.  
19 1923). As explained above, Plaintiff fails to allege facts supporting an inference that the  
20 deputies acted with a purpose other than enforcement of the law. Plaintiff’s assertion that  
21 the deputies acted “with malice and/or with improper and unconstitutional motives” merely  
22 restates the element and thus does not alter this conclusion. *See Twombly*, 550 U.S. at 555  
23 (explaining that “a formulaic recitation of the elements of a cause of action” is insufficient  
24 to state a claim).

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25 <sup>5</sup> It should be noted that Plaintiff contradicts herself by alleging that “[n]either  
26 female had identification.”

27 <sup>6</sup> For a malicious-prosecution theory to support a § 1983 claim, the plaintiff  
28 must also allege that the defendant’s conduct was done for the purpose of denying the  
plaintiff a “specific constitutional right.” *Lacey v. Maricopa County*, 693 F.3d 896, 919  
(9th Cir. 2012) (en banc) (quoting *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th  
Cir. 1995)).

1 Plaintiff's § 1983 claims for abuse of process and malicious prosecution (Count I)  
2 will be dismissed. Plaintiff's state-law claims for abuse of process and malicious  
3 prosecution (Count IV) will also be dismissed.

4 **D. Substantive Due Process & Equal Protection**

5 Plaintiff has failed to state a § 1983 claim based on the denial of substantive due  
6 process. She alleges that Defendants violated 18 U.S.C. § 242, which makes it a crime for  
7 state actors to deprive any person of constitutional rights "on account of such person being  
8 an alien, or by reason of his color, or race." Assuming that a violation of § 242 is sufficient  
9 to establish a substantive due process claim,<sup>7</sup> Plaintiff's claim nevertheless fails. She does  
10 not allege that she is an alien or a particular color or race, or that the deputies submitted  
11 charges against her based on one of those characteristics. Consequently, her § 1983 claim  
12 for violation of substantive due process (Count II) will be dismissed.

13 Plaintiff has also failed to state a § 1983 claim based on the denial of equal  
14 protection to her "class of one." "In order to claim a violation of equal protection in a class  
15 of one case, the plaintiff must establish that the [defendant] intentionally, and without  
16 rational basis, treated the plaintiff differently from others similarly situated." *N. Pacifica*  
17 *LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008). The plaintiff "must show that  
18 the discriminatory treatment 'was intentionally directed just at him, as opposed . . . to being  
19 an accident or a random act.'" *Id.* (quoting *Jackson v. Burke*, 256 F.3d 93, 96 (2d Cir.  
20 2001) (per curiam)). Plaintiff's assertion that the deputies treated her "different from others  
21 similarly situated" is not supported by the Complaint. It is not clear, for instance, which  
22 individuals are similarly situated to Plaintiff. Furthermore, there are no allegations  
23 supporting an inference that the deputies intentionally discriminated against Plaintiff, or  
24 that the deputies had ever encountered Plaintiff prior to the traffic stop. Thus, her § 1983  
25 claim for violation of equal protection (Count III) will be dismissed.

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27 <sup>7</sup> "To constitute a violation of substantive due process, the alleged deprivation  
28 must 'shock the conscience and offend the community's sense of fair play and decency.'" *Sylvia Landfield Tr. v. City of Los Angeles*, 729 F.3d 1189, 1195 (9th Cir. 2013) (quoting *Marsh v. County of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012)).

1           **E.     State-Law Claims**<sup>8</sup>

2           Plaintiff has failed to state a claim for intentional infliction of emotional distress.  
3           This claim requires proof that (1) the defendant engaged in “extreme” and “outrageous”  
4           conduct (2) with intent to cause emotional distress or reckless disregard that emotional  
5           distress will occur, and (3) the plaintiff suffers severe emotional distress. *McKee v.*  
6           *Arizona*, 388 P.3d 14, 20 (Ariz. Ct. App. 2016) (citations omitted). The trial court must  
7           initially determine whether the alleged conduct meets the “high standard” for outrageous  
8           conduct. *Johnson v. McDonald*, 3 P.3d 1075, 1080 (Ariz. Ct. App. 1999). Here, the  
9           deputies’ alleged conduct cannot be described as “so outrageous in character, and so  
10          extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as  
11          atrocious and utterly intolerable in a civilized community.” *Id.* (quoting *Cluff v. Farmers*  
12          *Ins. Exch.*, 460 P.2d 666, 668 (Ariz. Ct. App. 1969)).

13          Plaintiff has also failed to state a claim for gross negligence. In addition to the four  
14          elements of a negligence claim,<sup>9</sup> a claim for gross negligence requires a showing of  
15          “[g]ross, willful, or wanton conduct.” *Noriega v. Town of Miami*, 407 P.3d 92, 98 (Ariz.  
16          Ct. App. 2017) (quoting *Armenta v. City of Casa Grande*, 71 P.3d 359, 364 (Ariz. Ct. App.  
17          2003)). Conduct is grossly negligent if “[i]t is flagrant and evinces a lawless and  
18          destructive spirit.” *Cullison v. City of Peoria*, 584 P.2d 1156, 1160 (Ariz. 1978) (citations  
19          omitted). For the reasons given above, nor can the deputies’ alleged conduct be

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20                 <sup>8</sup> Having dismissed all of Plaintiff’s federal-law claims, the Court could  
21                 decline to exercise supplemental jurisdiction over her state-law claims. 28 U.S.C. §  
22                 1367(c)(3). However, because Plaintiff will be given leave to amend the Complaint, the  
23                 Court will determine whether Plaintiff has adequately pleaded her state-law claims.  
24                 Plaintiff is advised, though, that if she fails to state a federal-law claim in her amended  
25                 complaint, the Court will decline to exercise supplemental jurisdiction over her state-law  
26                 claims. See *Parra v. PacifiCare of Ariz., Inc.*, 715 F.3d 1146, 1156 (9th Cir. 2013)  
27                 (“[O]nce the district court, at an early stage of the litigation, dismissed the only claim over  
28                 which it had original jurisdiction, it did not abuse its discretion in also dismissing the  
29                 remaining state claims.” (citing § 1367(c)(3))); *Sanford v. MemberWorks, Inc.*, 625 F.3d  
30                 550, 561 (9th Cir. 2010) (“[I]n the usual case in which all federal-law claims are eliminated  
31                 before trial, the balance of factors to be considered under the pendent jurisdiction  
32                 doctrine—judicial economy, convenience, fairness, and comity—will point toward  
33                 declining to exercise jurisdiction over the remaining state-law claims.” (citation omitted)).

34                 <sup>9</sup> Negligence requires (1) a duty of care; (2) a breach of the duty by the  
35                 defendant; (3) a causal connection between the breach and the plaintiff’s injury; and (4)  
36                 damages. *Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz. 2007) (citing *Ontiveros v. Borak*, 667  
37                 P.2d 200, 204 (Ariz. 1983)).



1 characterized as grossly negligent.

2 Finally, Plaintiff has failed to state a claim for false arrest and imprisonment. “The  
3 essential element necessary to constitute either false arrest or false imprisonment is  
4 unlawful detention. A detention which occurs pursuant to legal authority, such as a valid  
5 warrant, is not an unlawful detention.” *Slade*, 541 P.2d at 552 (citing *Catrone v. 105*  
6 *Casino Corp.*, 414 P.2d 106 (Nev. 1966)). Accepting Plaintiff’s allegations as true, the  
7 officers had probable cause to believe that the female claiming to be Emily Cota had  
8 committed a crime, as she admitted to the possession of drug paraphernalia. *See Reams v.*  
9 *City of Tucson*, 701 P.2d 598, 601 (Ariz. Ct. App. 1985) (stating that probable cause exists  
10 if officer has reasonable grounds to believe a crime was committed and that a particular  
11 person committed it). Probable cause is a defense to a claim of false arrest or  
12 imprisonment. *Slade*, 541 P.2d at 552–53. That the deputies may have discovered the  
13 suspect’s true identity with further investigation does not defeat a finding of probable  
14 cause. *See id.* (finding officer had probable cause to arrest plaintiff although further  
15 investigation would have revealed plaintiff committed no crime).

16 Accordingly, Plaintiff’s state-law claims for intentional infliction of emotional  
17 distress, gross negligence, and false arrest and imprisonment will be dismissed.

#### 18 **F. Leave to Amend**

19 “In dismissing for failure to state a claim, a district court should grant leave to amend  
20 even if no request to amend the pleading was made, unless it determines that the pleading  
21 could not possibly be cured by the allegation of other facts.” *Ebner v. Fresh, Inc.*, 838 F.3d  
22 958, 963 (9th Cir. 2016) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)).  
23 The Complaint’s primary defect is a lack of factual allegations. Thus, Plaintiff will be  
24 given leave to amend.<sup>10</sup> Failure to support her claims with factual allegations may result  
25 in dismissal of the amended complaint without leave to amend.

26 Defendants raise one other issue: that Deputy Bratt and Deputy Fortner are entitled

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27 <sup>10</sup> The Motion to Amend, which seeks only to add a state-law defamation claim,  
28 will be denied as moot because Plaintiff is being given leave to amend in connection with  
the granting of the Motion to Dismiss. Plaintiff may add whatever claims she desires in  
her amended complaint.

1 to qualified immunity. The Court will reserve ruling on this issue until an amended  
2 complaint is filed. *See Broam v. Bogan*, 320 F.3d 1023, 1032–34 (9th Cir. 2003) (noting  
3 that officers who ignore evidence negating probable cause are not entitled to qualified  
4 immunity and concluding that plaintiffs could possibly amend their complaint to state valid  
5 constitutional claims).


6 **IT IS ORDERED:**

7 1. The Motion to Dismiss (Doc. 18) is **granted**. The Maricopa County Sheriff's  
8 Office is **dismissed with prejudice**. The Complaint (Doc. 1) is **dismissed with leave to**  
9 **amend**. Plaintiff shall file her first amended complaint within **14 days** of the date this  
10 Order is docketed.

11 2. The Motion to Amend (Doc. 21) is **denied as moot**.

12 Dated this 30th day of January, 2019.

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Honorable Rosemary Márquez  
United States District Judge